MOTION FILED
NOV 23 1992

92-714

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Francis G. Hinkleman, Petitioner
vs.
Shell Oil Co., Respondant

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND AMICUS CURIAE BRIEF OF SERVICE STATION DEALERS OF AMERICA
SOUTH CAROLINA SERVICE STATION ASSOCIATION
NATIONAL ASSOCIATION OF AMERICAN FRANCHISEES

Dimitri G. Daskalopoulos
4801 Mass. Ave. NW
Suite 400
Washington, D.C. 20016
(202) 895-1650
Counsel for Amicus

TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities.....ii

Discussion.....1

The PMPA Claim.....6

The "Event" Provisions.....14

The Price Discrimination Claims....26

MOTION FOR LEAVE TO FILE

The Service Station Dealers of America, South Carolina Service Station Association, and National Association of American Franchisees hereby make this Motion for Leave to file the attached Amicus Brief in support of the Petition for a Writ of Certiorari. Counsel for Petitioner has consented to the filing, consent from Counsel for Respondant has not been obtained.

In support thereof Amici state:

1. The SSDA and NAAF are national trade associations representing gasoline retailers and other franchisees, representing over 120,000 gasoline franchised businesses. The SCSSA represents over 500 independent gasoline retailers in the state of South Carolina.

2. The issues raised by the Petition of grave concern to all 3 associations. The proper interpretation of the PMPA is particularly important to the SSDA,and SCSSA. Both groups believe that the Fourth Circuit either did not take into account, or did not have before it crucial legislative history of the PMPA. As a result, the Court has issued what is without doubt the most

restrictive per se termination rule in the annals of PMPA litigation. Moreover, this is the first decision we are aware of that rejects the well settled principle that a franchisors' discriminatory treatment of a given dealer is irrelevant in a PMPA termination action. As this decision conflicts with previous decisions of at least 3 other Circuits, leave to file is sought so that the Court may have the benefit of other decisions and legislative history in informing its decision on whether to grant certiorari.

3. The Robinson - Patman issues raised are of grave concern to all 3 associations. SCSSA in particular is concerned that the ruling de facto preempts important South Carolina trade regulation statutes.

The SSDA and NAAF are particularly appalled at the ruling, which is contrary to a long line of Supreme Court precedent, and to the legislative history of the Robinson-Patman Act. As active participants before the Supreme Court in recent RPA cases such as Texaco Inc. v. Hasbrouck, we believe that we can bring to tyhe Court a national perspective on these issues of extreme importance to gasoline retailing, an industry that affects the lives of nearly every American on a daily basis, as well as the other industries

represented by NAAF.

4. The Associations have come together on a joint filing to avoid the burden of multiple filings.

5. The Court has previously granted leave to file Amicus Briefs to the SSDA both in support or opposition to Petitions for Certiorari, as well as on the merits in the past, and has cited those briefs in its opinions.

Respectfully submitted,

Dimitri G. Daskalopoulos

Dimitri G.Daskalopoulos

QUESTIONS PRESENTED

1. Does Section 102 (b)(2)(C) of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et.seq., allowing termination of a franchise upon "the occurance of an event making termination reasonable"
allow for a Court to make an inquiry into the objective reasonbleness of the termination, including factors such as pretext, or arbritrary and discriminatory treatment ?

2. Is Section 2 (e) of the Robinson - Patman Act limited in application to the providing of advertising and promotional services, or does it apply to the providing of facilities as well?

If the Act does apply to facilities, is a gasoline service station such a facility ?

3. Is the discriminatory providing of a facility in connection with the resale of a commodity addressable under Section 2 (a) of the Robinson-Patman Act, Section 2 (e) of that Act, or both ?

DISCUSSION

The Service Station Dealers of America, South Carolina Service Station Dealers Association, and National Association of American Franchisees submit this amicus curiae brief in support of Petitioner's Application for a Writ of Certiorari, and would also ask the Court to consider the question of whether the discriminatory providing of a facility in connection with the resale of a commodity should be addressed under Section 2(a) of the Robinson-Patman Act, Section 2 (e) or both. This Court

has not heard a case under the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et. seq., since that law was adopted in 1978. The Act has been the subject of numerous conflicting interpretations of various issues, including those presented in the Petition, upon which there is a 3 to 3 split in the Circuits.

The opinion of the Fourth Circuit, adopting a per se termination rule under Section 102 (b)(2)(C) of the Petroleum Marketing Practices Act is contrary to the language of the statute, the legislative history of the provision (which is not addressed in that Court's opinion), and is in irreconcilable conflict the law of three other Circuits. The opinion will

continue to cause uncertainty and needless litigation, in an industry that affects the life of nearly every American on a daily basis.

The writ should also be granted in order to review the critical Robinson-Patman issues in this case. First, there is a need for this Court to address the issue of what constitutes a "service or facility" under Section 2 (e) of the Robinson-Patman Act, an issue that has not been addressed since the decision in F.T.C. v. Simplicity Pattern Co., 360 U.S. 55 (1959).

Next, the Fourth Circuit held that discriminations of the type alleged in this case should be addressed solely under Section 2 (a)

of the Act; rather than 2 (e) because Section 2 (e) does not permit the cost justification defense. This is an issue that has also been subject to conflicting interpretations. See generally, Note, The Distinction Between the Scopes of Section 2 (a) and Sections 2 (d) and 2 (e) of the Robinson-Patman Act, 83 Mich. L. Rev. 1584.

The issue of whether a given practice should be addressed under Section 2(a) as opposed to Sections 2 (d) or (e), or addressed under both provisions [(a) and (d) or (e)] has been left open by this Court since the 1968 decision in F.T.C. v. Fred Meyer Inc., 390 U.S. 341 (1968). The holding of the Fourth Circuit squarely raises

this question, therefore it should be reviewed by this Court.

The plurality opinion based its intrepretation on a claim that the Robinson-Patman Act adopted the neo-classical definition of "consumer welfare" as its sole goal, to the exclusion of other goals, such as the protection of competition through the protection of small business competitors. This holding has absolutely no support in the history of the Act.

The decision in effect preempts the law not only of the state of Maryland, but statutes in each of the states of the Fourth Circuit.

This Court, as recently as its

1989 decision in California v. ARC America , 490 U.S. 93 (1989), has repeatedly held that state antitrust and trade regulation laws are NOT preempted by their federal counterparts. See also, Department of Consumer Affairs v. Isla Petroleum Corp., 490 U.S. 1384 (1989).

By imposing its interpretation (a distorted one at that) of federal law on a state statute whose plain language differs from the federal law, the Fourth Circuit plurality has de facto preempted the state statute, and worse, has engaged in precisely the type of "judicial legislating" which this Court expressly refused to do in rejecting the "automatic damages" rule under the Robinson- Patman Act in J.

Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981).

Amici belief that the writ should be granted in order to clarify the numerous conflicting opinions over what constitutes a service or facility under Sections 2 (e) and (d) of the Robinson-Patman Act; and to address the issue raised by the holding of the 4th Circuit that the furnishing of facilities or services on terms which are not proportional should be addressed under Section 2(a) of the Act, rather than 2(e). See, Petition for Writ of Certiorari at Appendix A, pages A17, 18.

I. THE PMPA CLAIM

The various Circuits have consistently held that PMPA's

principal concern is the protection of franchisees, and that as remedial legislation the Act must be given a liberal construction consistent with its goal of protecting franchisees. See, e.g., Barnes v. Gulf Oil, 824 F.2d. 300, 304 (4th Cir. 1987). This view is strongly supported by the legislative history of the Act:

> "It is apparent from the legislative history of the Act that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with petroleum retailers." Note, Judicial Interpretation of the

Petroleum Marketing Practices Act: Conflict and Diversity, 32 Emory L.J. 273 at 274 (hereinafter cited as "Note, supra, Emory L.J.").

The PMPA was the culmination of several years of hearings on the subject of gasoline marketing held by the House Committees on Interstate and Foreign Commerce; and Small Business, under the leadership of Chairman John Dingell, the primary author of the PMPA. See generally, Comment, Retail Gasoline Franchise Terminations and Nonrenewals Under Title One of the Petroleum Marketing Practices Act , 1980 Duke L.J. 522, 529 n.40 (hereinafter cited as "Comment")

Oil companies testified that

legislation was not needed, because their own economic interests provided a sufficient check on abusive conduct.

Prior to the passage of the Act, commentators rejected the oil companies arguments and concluded the typical oil franchise relationship was unfair to the franchisee:

> "In the nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short term contracts will not be renewed unless they submit to burdensome franchisor- imposed practices... It is generally

conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising"... Comment, supra, at 525, 526.

Thus , as held by the Third Circuit sitting en banc in Slatky v. Amoco Oil Corp.

"The very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline distributors that remedial legislation was unnecessary because the interests of distributions and franchisees were in harmony." 830 F.2d 476, 483.

In enacting the PMPA, Congress sought to preserve flexibility for franchisors to respond to changing market conditions. It was not the intent of Congress to allow the flexibility to subvert the primary purpose of the Act: franchise protection. As Chairman Dingell stated in bringing the bill before the House:

> " I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or non-renewal of a franchise are intentionally broad enough to provide franchisors the

flexibility which to meet changing consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections this legislation is intended to provide and to assure that this flexibility, does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms." ;123 Cong. Rec. p. 10383, April 5, 1977 (Statement of Rep. John Dingell).

Clearly, the remedial purpose of the PMPA requires that the Act be liberally construed, as recognized by

the Third, Sixth, and Seventh Circuits, who disagree with the intrepretation of the PMPA put forth by the Fourth Circuit in this case.

A. EVENTS RELEVANT TO THE FRANCHISE RELATIONSHIP, AND AS A RESULT OF WHICH TERMINATION OF THE FRANCHISE IS REASONABLE

The PMPA, 15 U.S.C. 2801 et. seq., prohibits termination of a franchise or non-renewal of a franchise relationship as a general rule. 15 USC 2801(a). See, Senate Report No. 95-731 reprinted in 1978 US Code Cong. & Admin. News 875. The Report further provides that "Exceptions to the rule against termination or non-renewal are provided for in section 102(b) of the

Act." 1978 U.S.Code.Cong. & Ad. News. @ 876.

Cardinal rules of statutory construction, as well as the legislative history and remedial intent of the PMPA dictate that these exceptions not be interpreted in a way that swallows up the rule against termination or non-renewal.

The exception at issue in this case is found at 15 U.S.C. 2802 (b)(2)(C): the occurrence of an event relevant to the franchise relationship as a result of which **termination of the franchise or non-renewal of the franchise relationship is reasonable.** As the highlighted language makes clear, the issue in construing the event exception is whether or not the

termination or non-renewal is objectively reasonable in light of all of the facts and circumstances. Marathon Petroleum Co. v. Pendleton, 889 F.2nd 1509 (6th Cir. 1989); cf. Darling v. Mobil Oil Co., 864 F.2d 981 (2nd Cir. 1989) (term "reasonable" under the PMPA means objective reasonableness under all of the facts and circumstances); Doeberiner v. Sohio Oil Co., 880 F.2d 1213, as amended 893 F.2d 1275 (11th Cir. 1989) (same- defines reasonable to mean " fair, just, moderate or proper, 893 F.2d at 1276).

Time and space limitations prevent us from providing a detailed recount of the legislative history of the "event' exception in this brief,

however, it should be noted that the "event" provision appeared in HR 13000, the original version of the PMPA in the 94th Congress.

The hearing records reveal that oil companies requested that Congress adopt an illustrative "laundry list" to provide some guidance to the courts, as well as to the industry, as to what might constitute such an event.

Congress adopted such an illustrative list, which appears at 15 U.S.C. 2802(c). It did not honor the request of the companies with respect to the "failure to pay sums due provision" in that they requested language stating that failure to pay in accordance with the terms of the

contract, as opposed to the failure to timely pay provision ultimately adopted, could, in some circumstances, constitute reasonable grounds for termination.

The Fourth Circuit adopted a per se termination rule, when one of the enumerated events occurs. The basis for this holding is the belief that the "language is sufficiently clear and not at odds with the legislative history".

The irreconcilable conflict between the Circuits on this "sufficiently clear" language is precisely what this Court alone can resolve. We believe that the intrepretation of the Third, Sixth and Seventh Circuits is in accord with the

language of the the statute, which clearly makes puts the overall reasonableness of the termination at issue ("event making termination reasonable") is the correct one, as opposed to that of the First, Second, and in this case, Fourth Circuits.

The Fourth Circuit stated that history of the statute supported its interpretation, but amazingly the opinion makes no reference to it ! The history reveals that while PMPA is a balanced statute, it is unequivocally balanced towards the franchisee, as discussed in detail, supra, and that the Act is given a liberal construction consistent with the primary goal of protecting franchisees.

The history of the event section undercuts not only the Fourth Circuit's opinion, but those of the Second and First Circuits as well.

The Senate Report alone contains considerable discussion of the event exception. With respect to the "failure to timely pay" exception it states:

> "Another enumerated event relates to the failure by the franchisee to pay to the franchisor all sums to which the franchisor is legally entitled. A standard of timely payment is utilized. **This standard is intended to permit evaluation of nonpayment or late payment**

in view of prevailing commercial or industry trade practices."

1978 U.S.Code Cong. and Ad.News at 896. Application of a per se rule prevents this evaluation from taking place, and would allow petroleum franchisors to terminate disfavored dealers in an arbitrary and discriminatory manner. Almost all oil companies have an established trade practice for handling dealer and distributors with financial problems. Evidence that an oil company treated a particular dealer in a manner inconsistent with its own established practices, or inconsistently with similarly situated dealers should be allowed to be evaluated by the trier

of fact, to determine whether the termination is in fact objectively reasonable. The 4th Circuit opinion throws out a long line of cases holding that retaliatory and discriminatory treatment are evils which the PMPA was designed to address, and that any presumption of reasonableness that arises as the result of the occurrence of an enumerated event is rebuttable. A number of these cases have been cited in the Petition, suffice it to say that the rejection by the Fourth Circuit of a long line of cases holding that such pretextual, arbritrary, and discriminatory treatment of dealers is indeed relevant to the analysis cries out for

review by this Court.

We would direct the Court's attention to a recent Committee Report issued by Chairman Dingell, the author of the PMPA, which contains the following discussion of the event section:

> "The occurrence of one of the events on this list is presumed to constitute reasonable grounds for termination, **but can be rebutted by a showing to the contrary. See, e.g., Sun Refining and Marketing Co. v. Rago, 741 F.2d 670 (3rd Cir. 1984)**." House Report #100-1000 (100th Congress, 1988 at p. 9,10)

Given the fact that the author of the PMPA, Chairman Dingell, cites the decision of the Third Circuit in Rago with approval, we believe that the per se termination rule is not in accord with the original intent of the Act.

The legislative history of other events, such as underlying leases also supports this view :

> "Among the enumerated events is the loss of the franchisor's right to grant continued possession of the premises under certain circumstances. Expiration of the underlying lease could occur under a variety of circumstances including, for example, a decision by the

franchisor not to exercise an option to renew the underlying lease. **However, it is not intended that the termination or non-renewal should be permitted based upon the expiration of a lease which does not evidence the existence of an arms length relationship between the parties and as a result of which no substantive change in control of the premises results."** 1978 U.S.Code.Cong. & Ad.News at 896.

Under this opinion, if the event of condemnation of even one square

inch of the station property occured (15 U.S.C. 2802 (c)(5)); the Fourth Circuit would allow termination of the franchise, whereas at least three others would not.

This is a serious issue affecting over 120,000 franchised locations nationwide, that should not be left in the present situation of irreconcilable conflict.

B. THE PRICE DISCRIMINATION CLAIMS

Although the case arises under Maryland law, the language of the that statute closely mirrors that of the Robinson-Patman Act, and the decision of the Fourth Circuit under review is based solely on the RPA. The Fourth Circuit plurality ruling on the

Maryland Act claim is an abomination, a ruling that would turn Wright Patman over in his grave, and has not a SHRED of support in the legislative history. With all due respect, the most charitable description we have heard of this aspect of the opinion is that it is "utterly divorced from economic reality." The 4th Circuit has engaged in precisely the type of judicial legislating this Court condemned in J. Truett Payne, by refusing to follow Congress' directive in section 2(e) of Robinson-Patman as to what constitutes a service or facility and creating a per se rule of its own, and then by holding that the form of discrimination at issue should be addressed solely under Section 2 (a).

The opinion states that " The leased premises here do not actively promote the resale of gasoline by Hinkleman to the retail consumer. Rather, the premises merely facilitate Hinkleman's resale of gasoline. As we have already stated, Robinson -Patman section 2 (e) only prohibits discrimination through services, like advertising or mechandising, that promote resale of a commodity." 962 F.2d 372, @ 378, reprinted in Petition for Certiorari, Appendix A, p. A16.

The plain language of the statute refers not only to "services" but also to "facilities", thus the Fourth Circuit has not only split with its sister circuits, See,

e.g., Centex- Winston Corp. v. Edward Hines Lumber Co. , 447 F.2d 585 (7th Cir. 1971); cert. den. 405 U.S. 921 (1972), it has also attempted to rewrite both the Robinson-Patman Act.

The distinction between "promoting" and "facilitating" resale of a commodity is nowhere to be found either in the Robinson-Patman Act or the Maryland statute, and in any event it is unworkable, and makes no economic sense.

In the gasoline retailing industry, it is **PATENT NONSENSE** to HOLD that a gas station and station design does not promote the sale of gasoline.

Oil companies, dealers and distributors (known as "jobbers") are

spending hundreds of millions of dollars on image programs, promoting uniform station appearance, color schemes, canopy and convenience store designs, auto service franchises and programs,pump shapes and designs, and otherwise upgrading stations all in an effort to SELL THE COMMODITY - GASOLINE. There are thousands of pages of recent Congressional testimony we could cite on this point.

The Petroleum Marketing Practices Act strongly supports this holding: not only is the concept of leased marketing premises an integral part of the Act; See, 15 U.S.C. 2801(9), the history shows us that "the franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in

that the franchisor commonly not only grants a trademark license but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal sale item: motor fuel." 1978 U.S.Code.Cong.& Ad.News. at 875. It further provides that; "Therefore, the substantive provision of the title relating to the termination or non-renewal of the franchise relationship, may not be circumvented by a termination or non-renewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license valueless. Id. @ 888.

The Fourth Circuit supports its decree based on its concept of "consumer welfare" as the goal of the RPA, and its (mis)understanding of injury to competition under the Act.

The idea of "consumer welfare" (defined as eliminating conduct that reduces output) as the sole goal of the antitrust laws stems from Robert Bork's book: The Antitrust Paradox. This view of the goal of the antitrust laws has never been accepted by this Court or Congress, and is hotly disputed by most commentators who find wealth transfers from consumers to producers and other goals in the history of the Sherman and Clayton Acts.

Even Judge Bork acknowledges that

Robinson-Patman expressly includes the goal of "small business welfare": "The statute proceeds from the idea that price discrimination is a means of injuring competitors, usually small ones, and that injury to competitors results in injury to competition." Antitrust Paradox at 385. See, e.g., 80 Cong. Record 3113, "The more important concern is in injury to to the competitor who has suffered by the discrimination." (Statement of Sen. Logan, Senate Floor Manager of the Bill).

Indeed, even a cursory review of the legislative history of the Act supports the unbroken line of cases from FTC v. Morton Salt Co. 334 U.S. 37 (1948) through Texaco v. Hasbrouck

, 110 S.Ct. 2535 (1990) in holding that competitive injury is inferred from injury to a competitor, and that the Act was designed to preserve small businesses.

The Fourth Circuit's analysis of the history and purposes of the Robinson- Patman Act also conflict with the conclusions of other Circuits. See, e.g., Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) and J.F. Feeser v. Serv-A-Portion, 909 F.2d 1218 (3rd Cir., 1990).

In the absence of preemption, state statutes must be given effect. If the state decides a given practice harms competition, no Court cannot overrule the State based on its own

notions of what proper economic policy should be. The same is true of Congressional enactments, which this Court has repeatedly held with respect to not only the Robinson- Patman Act, but specifically with respect to Section 2 (e). F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 67,68. That is exactly what has happened here, and another reason why this Court should grant the writ.

The final issue upon which the petition should be granted is to determine whether the furnishing of a facility such as a gasoline station on proportionately unequal terms should be addressed under section 2 (a) of Robinson-Patman or Section 2 (e).

The Fourth Circuit held that "In

contrast, section 2(e) requires no showing of competitive injury. Behavior found to violate section 2 (e) is "illegal per se, irrespective of competitive impact, and without regard to statutory justification. Because application of a per se rule risks adverse consequences, we prefer to limit the scope of section 2 (e) to that necessary to fulfill the section's purposes. Other, nonpromotional forms of direct or indirect discrimination should be judged under the more flexible standards of section 2 (a) so that courts can protect procompetitive conduct from prosecution." 962 F.2d @ 379, Appendix A to Petition for Certiorari at A17, A18.

However noble the goal of the Fourth Circuit majority, they are acting contrary to the law, and that action should be reviewed by this Court.

The plain language of the statute does not even remotely support the majority opinion. As this held in Simplicitly Pattern:

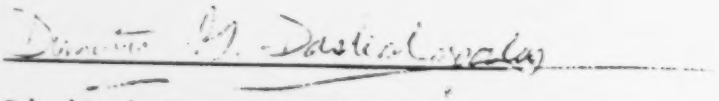
"We cannot supply what Congress has studiously omitted. Simplicity's arguemnts to the contrary are based essentially on the ground that it would be " bad law and bad economics" to make discriminations unlawful even where they may be accounted for by cost differentials or there is no competitive injury. Entirely aside from the fact that this Court is not

in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price discrimination and other discriminations differently is without a rational basis. In allowing a "cost justification defense" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings." 360 U.S. 55, 67, 68.

The legislative history on this point in our judgment makes clear that 2 (e) should reach the type of

discrimination alleged herein, therefore Amici would urge the Court to grant the writ on this important issue of the reach of section 2 (e), as well as all other issues presented.

Respectfully submitted,



Dimitri G. Daskalopoulos
4801 Mass. Ave. NW- Suite 400
Washington, D.C. 20016
(202) 895-1650

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1992, I mailed copies of this Motion for Leave to File and Brief Amicus Curiae in Support of Petition for Certiorari to:

Harry C. Storm

4550 Montgomery Ave. #760N
Bethesda, Md. 20814
Counsel for Petitioner

and to
M. Albert Figinski
Weinberg & Green
100 S. Charles St.
Baltimore, Md. 21201
Counsel for Respondant

D G. Daskalopoulos

Dimitri G. Daskalopoulos